

(2)
No. 87-1201

Supreme Court, U.S.
FILED
FEB 18 1988
JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK
and MYLES OSTERNECK and GUY-KENNETH
OSTERNECK as TRUSTEES for the BENEFIT of
ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GORDON LEE GARRETT, JR.
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 581-8000

*Counsel of Record for
Respondent*

RICHARD M. KIRBY
WILLIAM B. B. SMITH
GREGORY R. HANTHORN
HANSELL & POST
Atlanta, Georgia

Attorneys for Respondent

QUESTION PRESENTED

Is a post-judgment motion filed within the ten days prescribed by Fed. R. Civ. P. 59(e), and which seeks to change the original judgment by adding discretionary prejudgment interest to the amount of plaintiffs' recovery on federal securities claims, a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdictional Statement	3
Federal Rules Involved	4
Statement of the Case	5
Reasons for Denying the Writ	7
I. The Eleventh Circuit's Opinion Does Not Conflict With Decisions Of Other Circuit Courts Or This Court	7
II. Petitioners Fail To Come Within The "Unique Circumstances" Exception To The Require- ment Of A Timely Appeal	11
Conclusion	13
Appendix	App. 1

TABLE OF AUTHORITIES

Cases:	Page
<i>City Nat'l Bank v. American Commonwealth Fin. Corp.</i> , 608 F. Supp. 941 (W.D.N.C. 1985), <i>aff'd</i> , 801 F.2d 714 (4th Cir. 1986), <i>cert. denied sub nom. Great Commonwealth Life Ins. Co. v. Branch Bank & Trust Co.</i> , ____ U.S. ____, 107 S. Ct. 1301 (1987)	9
<i>Harcon Barge Co. v. D&G Boat Rentals, Inc.</i> , 784 F.2d 665 (5th Cir.) (in banc), <i>cert. denied sub nom. Southern Pac. Transp. Co. v. Harcon Barge Co.</i> , ____ U.S. ____, 107 S. Ct. 398 (1986)	7, 10
<i>Jenkins v. Whittaker Corp.</i> , 785 F.2d 720 (9th Cir.), <i>cert. denied</i> , ____ U.S. ____, 107 S. Ct. 324 (1986)	7, 9
<i>Marane, Inc. v. McDonald's Corp.</i> , 755 F.2d 106 (7th Cir. 1985)	11
<i>Osterneck v. E.T. Barwick Industries, Inc.</i> , 825 F.2d 1521 (11th Cir. 1987)	<i>passim</i>
<i>Thompson v. Immigration & Naturalization Serv.</i> , 375 U.S. 384 (1964)	11, 12
<i>White v. New Hampshire Dep't of Employment Sec.</i> , 455 U.S. 445 (1982)	7, 8, 9
<i>Wolf v. Frank</i> , 477 F.2d 467 (5th Cir.), <i>cert. denied</i> , 414 U.S. 975 (1973)	9
Statutes, Regulations & Other Authorities:	
15 U.S.C. § 78j(b)	5
15 U.S.C. § 78t	5
28 U.S.C. § 1254(1)	3

42 U.S.C. § 1988	7
17 C.F.R. § 240.10b-5	5
Sup. Ct. R. 17.1(a)	10
Fed. R. App. P. 4(a)(4)	4, 6
Fed. R. App. P. 4(a)(5)	6
Fed. R. Civ. P. 59(e)	<i>passim</i>

No. 87-1201

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MYLES OSTERNECK, GUY-KENNETH OSTERNECK
and MYLES OSTERNECK and GUY-KENNETH
OSTERNECK as TRUSTEES for the BENEFIT of
ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ernst & Whinney respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion which dismissed Petitioners' appeal in this case for lack of jurisdiction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987), and is set forth in Petitioners' Appendix at 15.

The original judgment on the merits in the District Court is set forth in Petitioners' Appendix at 4.

Petitioners' motion for discretionary prejudgment interest and brief in support are set forth in the Appendix hereto ("Respondent's Appendix") at 1.

The order of the District Court awarding Petitioners prejudgment interest and amending the original judgment to reflect this additional award is set forth in Petitioners' Appendix at 8.

The Amended Judgment is set forth in Petitioners' Appendix at 14.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 31, 1987. Rehearing and rehearing in banc were denied on October 19, 1987. Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a)(4) of the Federal Rules of Appellate Procedure:

(a) Appeals in Civil Cases.

. . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This securities fraud case arose out of the September 8, 1969 merger of Cavalier Bag Company ("Cavalier"), a corporation owned by Petitioners, into E. T. Barwick Industries, Inc. ("Barwick Industries"). Pursuant to the merger, Petitioners exchanged their stock in Cavalier for stock in Barwick Industries. In agreeing to the exchange, Petitioners allegedly relied on Barwick Industries' audited financial statements for the two years preceding the merger. Respondent Ernst & Whinney ("E&W"), the independent certified public accountants for Barwick Industries, audited those financial statements.

Almost six years after the merger, on September 4, 1975, Petitioners filed this action alleging violations of Sections 10(b) and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and the common law of Georgia.

Following almost ten years of pre-trial proceedings, this case went to trial in October, 1984, against Barwick Industries; E. T. Barwick, B. A. Talley and M. E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger; and E&W. After a three and one-half month jury trial, a verdict was returned in favor of E&W and E. T. Barwick, individually. However, the jury found in favor of Petitioners against defendants Barwick Industries, Talley and Kellar in an amount exceeding \$2.6 million as compensatory damages for their violations of federal securities laws and Georgia common law.

The original judgment was entered on January 30, 1985. Within the ten-day time limit prescribed by Fed. R. Civ. P. 59(e), Petitioners filed and served a motion for prejudgment interest computed from September 8,

1969, the date of the merger. While that motion was pending, Petitioners filed a notice of appeal and two notices of cross-appeal from the January 30, 1985 judgment.

On July 1, 1985, the District Court entered its order on Petitioners' motion, awarding them over \$945,000 in prejudgment interest as a part of compensatory damages and ordering that the original judgment be "AMENDED" to reflect this additional award. The Amended Judgment was entered on July 9, 1985.

Petitioners failed to appeal from the Amended Judgment as to Respondent E&W. The Eleventh Circuit held that Petitioners' motion for prejudgment interest was a Rule 59(e) motion to alter or amend the original judgment. Therefore, the notices of appeal filed while the Rule 59(e) motion was pending had no effect. See Fed. R. App. P. 4(a)(4). Accordingly, the Eleventh Circuit dismissed Petitioners' appeal as to Respondent E&W for lack of jurisdiction.

At the time the Eleventh Circuit rendered its decision, there was pending in the District Court Petitioners' motion for an extension of time in which to file their appeal as to E&W. The District Court had deferred ruling on that motion pending the Eleventh Circuit's decision. See *Osterneck*, 825 F.2d at 1528 n.12. The Eleventh Circuit expressly noted that "[f]ollowing this dismissal, the district court may entertain the Osternecks' motion." *Id.*

The District Court later denied the motion, concluding that Petitioners had not carried their burden of showing excusable neglect as required by Fed. R. App. P. 4(a)(5). Inexplicably, Petitioners failed to appeal that denial to the Eleventh Circuit. Had they done so, and had the Court of Appeals reversed, their petition would not be before this Court.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT.

The Eleventh Circuit held that a post-judgment motion which is filed within the ten days prescribed by Rule 59(e), and which seeks to add discretionary prejudgment interest to plaintiffs' recovery on federal securities law claims, is a Rule 59(e) motion to alter or amend the original judgment. Contrary to Petitioners' suggestion, that holding does not conflict with this Court's "definition of a Rule 59(e) motion" in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445 (1982), the Ninth Circuit's opinion in *Jenkins v. Whitaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 324 (1986), or the Fifth Circuit's "approach to Rule 59(e)" in *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (in banc), *cert. denied sub nom. Southern Pac. Transp. Co. v. Harcon Barge Co.*, ___ U.S. ___, 107 S. Ct. 398 (1986).

In *White*, this Court held that a post-judgment request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is not a motion to alter or amend the judgment subject to the ten-day timeliness standard of Rule 59(e). The Court reasoned as follows:

[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. By contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59(e) was never intended to apply.

. . . Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.

. . . "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

455 U.S. at 451-52 (citations and footnote omitted).¹

The Eleventh Circuit's decision is consistent with *White* because factors supporting the "collateral" nature of the Section 1988 attorney's fee request in *White* are absent here. First, the request for prejudgment interest in this case did imply a change in the original judgment. *Osterneck*, 825 F.2d at 1526 (Petitioners' motion "requests a substantive alteration of a court's judgment"). Indeed, Petitioners' motion resulted in an "Amended Judgment." Second, the award of prejudgment interest in this case was not "uniquely separable" from the decision on the merits because it constituted an element of compensation for the injury giving rise to the action. The Eleventh Circuit recognized that in federal securities cases "prejudgment interest is compensation which directly stems from the injury giving

¹ The Court in *White* specifically acknowledged precedents holding that the issue of attorney's fees in civil rights cases was so independent of the merits action as to support a separate federal action "solely to obtain an award of attorney's fees" for legal work done in prior proceedings. 455 U.S. at 451 n.13 (quoting *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980)).

rise to the action." *Id.* The District Court also noted that in federal securities cases "prejudgment interest is a part of compensatory damages" to be "tempered by an assessment of the equities" (Petitioners' Appendix at 10 (citation omitted)). Those "equities" are determined by factors inseparable from the merits, including the degree of personal wrongdoing on the part of the defendant and whether the award of prejudgment interest would in fact be compensatory. See, e.g., *Wolfe v. Frank*, 477 F.2d 467, 479 (5th Cir.), cert. denied, 414 U.S. 975 (1973); *City Nat'l Bank v. American Commonwealth Fin. Corp.*, 608 F. Supp. 941, 943 (W.D.N.C. 1985), aff'd, 801 F.2d 714 (4th Cir. 1986), cert. denied sub nom. *Great Commonwealth Life Ins. Co. v. Branch Bank & Trust Co.*, ___ U.S. ___, 107 S. Ct. 1301 (1987). Thus, there is no conflict between the Eleventh Circuit's opinion and *White's* "definition of a Rule 59(e) motion."

Petitioners are unable to cite, and Respondent is unaware of, a single decision holding that an award of prejudgment interest for a violation of federal securities law is collateral to the merits or outside Rule 59(e). The Ninth Circuit's opinion in *Jenkins* involved the award of prejudgment interest in a wrongful death action governed by Hawaii law. In concluding that prejudgment interest was not compensation for the injury giving rise to that particular action, the Ninth Circuit relied upon a decision of the Hawaii courts. *Jenkins*, 785 F.2d at 737. This application of local law does not

² Petitioners represented to the District Court that an award of prejudgment interest "would in fact be compensatory" and was "the only way" to make them whole. Brief in Support of Plaintiffs' Motion for Award of Prejudgment Interest (Respondent's Appendix at 8-10, 14 & 15).

present a conflict with a decision of the Eleventh Circuit "on the same matter." *Cf.* Sup. Ct. R. 17.1(a).

The Fifth Circuit's decision in *Harcon Barge* did not even involve a motion for prejudgment interest. It concerned a motion to amend a judgment to delete an award of costs, which the Fifth Circuit quite properly deemed a "motion to alter or amend the judgment" within Rule 59(e). *Harcon Barge*, 784 F.2d at 667. Regardless of the parameters of its "bright-line" test, *Harcon Barge* provides no support for the proposition that prejudgment interest is a "collateral" matter outside Rule 59(e).

II. PETITIONERS FAIL TO COME WITHIN THE "UNIQUE CIRCUMSTANCES" EXCEPTION TO THE REQUIREMENT OF A TIMELY APPEAL.

Petitioners also contend that the Eleventh Circuit's opinion conflicts with this Court's holding in *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964). To create this "conflict," Petitioners misstate the holding in *Thompson* and ignore the factual distinctions between *Thompson* and this case.

In *Thompson*, the petitioner served a motion for new trial within ten days after receipt of notice of entry of judgment, but twelve days after entry of judgment. The "trial court specifically declared that 'the motion for a new trial' was made 'in ample time.'" *Id.* at 384. In reliance on that statement, petitioner did not appeal from the original judgment, but timely appealed from the denial of the new trial motion. The court of appeals dismissed the appeal on the grounds that notice of appeal had not been filed within the time required after the entry of the original judgment, and that the new trial motion was untimely and, therefore, did not toll the running of the time for appeal.

This Court developed the "unique circumstances" exception to the requirement of a timely appeal. Under that exception "an appellate court may and should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n.2 (7th Cir. 1985).

Petitioners herein cannot demonstrate the "unique circumstances" required by *Thompson*. Neither the

District Court nor the Eleventh Circuit ever affirmatively represented to Petitioners that their appeal was timely. *Osterneck*, 825 F.2d at 1528.

With respect to Petitioners' purported reliance on the actions of the District Court, the Eleventh Circuit stated:

Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. See Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be — the judgment can be amended"); cf. *id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

Id. at 1528 n.11.

The Eleventh Circuit correctly applied the *Thompson* holding to the facts of this case and found that Petitioners failed to demonstrate the "unique circumstances" required to exercise jurisdiction over an untimely appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Atlanta, Georgia
February 16, 1988

Respectfully submitted,

GORDON LEE GARRETT, JR.
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 581-8000

Counsel of Record for Respondent

RICHARD M. KIRBY
WILLIAM B. B. SMITH
GREGORY R. HANTHORN
HANSELL & POST
Atlanta, Georgia

Attorneys for Respondent

App. 1

**IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MYLES OSTERNECK, et al.,

Plaintiffs,

v.

E. T. BARWICK INDUSTRIES, INC.,
et al.,

Defendants.

CIVIL ACTION

FILE NO. C75-1728A

**PLAINTIFFS' MOTION FOR AWARD
OF PREJUDGMENT INTEREST**

COME NOW Plaintiffs, Myles Osterneck, Guy-Kenneth Osterneck and Robert Osterneck and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (hereinafter "Plaintiffs") and move the Court for an award of pre-judgment interest from September 8, 1969 to the date of Judgment, January 30, 1985, against Defendants E. T. Barwick Industries, Inc., Melvin E. Kellar and Buford A. Talley, and respectfully show the Court the following:

1.

On January 30, 1985 a Verdict and Judgment in favor of Plaintiffs was filed and entered in the above-styled action and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley on their Federal Securities Claims and State of Georgia com-

App. 2

mon law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars (\$2,632,234.00) as compensatory damages.

2.

Pursuant to the instructions of the Court given to the jury, the amount of the compensatory damages awarded to Plaintiffs was based on their damages as of the date of the Merger Agreement which is September 8, 1969.

3.

The grounds and authority for the award of prejudgment interest to Plaintiffs and the appropriate amount of interest are provided in Plaintiffs' accompanying Brief in support of its Motion for an award of prejudgment interest concurrently filed herewith.

4.

Plaintiffs also submit in support of their Motion for an award of prejudgment interest an Affidavit of Walter M. Singer with exhibits which is currently filed herewith.

WHEREFORE, for the reasons contained in Plaintiffs' Brief and the Affidavit of Walter M. Singer, Plaintiffs respectfully request that this Court award it prejudgment interest from September 8, 1969 to the date of the Judgment.

App. 3

Respectfully submitted,

/s/

PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/

HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel:

WEBB & DANIEL
1901 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-8841

App. 4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

Philip R. Russ, Esq.
1005 Texas American Bank
Building
P. O. Box 12073
Amarillo, Texas 79101

Foy R. Devine, Esq.
Devine & Morris
Four Piedmont Center, Suite 111
3565 Piedmont Road, N.E.
Atlanta, Georgia 30305

Susan Hoy, Esq.
High House
309 Sycamore Street
Decatur, Georgia 30030

Richard M. Kirby, Esq.
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia 30383

Earle B. May, Jr., Esq.
Alston & Bird
1200 C&S National Bank
Building
35 Broad Street
Atlanta, Georgia 30335

This 11 day of February, 1985.

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

App. 5

IN THE

United States District Court FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MYLES OSTERNECK, et al.,

Plaintiffs,

v.

E. T. BARWICK INDUSTRIES, INC.,
et al.,

Defendants.

)
)
) CIVIL ACTION
)

) FILE NO. C75-1728A
)

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF PREJUDGMENT INTEREST

INTRODUCTION

Plaintiffs filed their Complaint in the above-referenced action on September 4, 1975. The trial of this case began on October 15, 1984 and ended with a verdict and judgment on January 30, 1985.

The verdict and judgment rendered by the jury was in favor of the Plaintiffs and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley (hereinafter "Defendants") on the Federal Securities claims and the Georgia common law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars (\$2,632,234.00) as compensatory damages. This verdict and judgment was filed and entered in the Clerk's office on January 30, 1985.

Pursuant to the Court's instructions given to the jury, the amount of compensatory damages was determined as of the date of the Merger Agreement entered into between Plaintiffs and Defendant E. T. Barwick Industries, Inc. That date is September 8, 1969. Thus, pursuant to the Court's instructions, the amount of \$2,632,234.00 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

Plaintiffs have filed concurrently herewith their Motion for an award of prejudgment interest at the request of the Court. Plaintiffs submit this Brief in support of their Motion. Plaintiffs also submit in support of their Motion an Affidavit of Walter M. Singer concurrently filed herewith, containing the calculations of an appropriate award of prejudgment interest.

ARGUMENT AND CITATIONS OF AUTHORITIES

1. PLAINTIFFS ARE ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST FROM SEPTEMBER 8, 1969 TO THE DATE OF JUDGMENT

It is well-established that in the absence of a statutory provision, the award of prejudgment interest lies within the discretion of the Court, including cases involving Federal Securities law and state common law fraud claims. *E.g.*, *Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403, 411 (1962); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, ___ U.S. ___, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (Federal Securities claim, §10(b) and Rule 10b-5 case); *Hembree v. Georgia Power Company*, 637 F.2d 423, 430 (5th Cir. 1981); *Payne v. Panama Canal Company*, 607 F.2d 155,

166 (5th Cir. 1979); *West v. Harris*, 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979); *Wolf v. Frank*, 477 F.2d 467 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) (federal securities claim under Rule 10b-5); *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

This well-established rule is universally applied by other jurisdictions. *E.g.*, *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192-193 (3d Cir. 1981) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38, 50 (2d Cir. 1978) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Holmes v. Bateson*, 583 F.2d 542, 564 (1st Cir. 1978) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 case); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1051 (7th Cir. 1977) (appropriate to award prejudgment interest in §10(b) and Rule 10b-5 merger case from the date of merger agreement to the date of judgment); *Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc.*, 496 F.2d 1255, 1268-1269 (4th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974) (appropriate to award prejudgment interest especially in §10(b) and Rule 10b-5 case); *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971); *Norte & Company v. Huffines*, 416 F.2d 1189, 1191, 1192 (2d Cir. 1969), *cert. denied sub nom*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); *Freschi v. Grand Coal Venture*, 588 F.2d 1257, 1260 (S.D.N.Y. 1984) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Western Federal Corporation v. Davis*, 553 F.Supp. 818 (D. Ariz. 1982) *aff'd*, 739 F.2d 1439 (9th Cir. 1984) (appropriate to award prejudgment interest at the on-going commercial money market rate in a

Federal Securities fraud case involving §10(b) and Rule 10b-5); *Spatz v. Borenstein*, 513 F.Supp. 571, 584 (N.D. Ill. 1981) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Blasdel v. Mullenix*, 356 F.Supp. 924, 928 (W.D. Okla. 1971) (appropriate to award prejudgment interest in a Federal Securities fraud case involving §10(b) and Rule 10b-5); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970) (appropriate to award prejudgment interest in Federal Securities fraud case involving §10(b) and Rule 10b-5).

II. THE FACTORS TO BE APPLIED IN DETERMINING AN APPROPRIATE AWARD OF PREJUDGMENT INTEREST

In determining whether to award prejudgment interest, the major factor permeating cases in which prejudgment interest has been allowed is the necessity to compensate an injured plaintiff, and the courts recognize that "the only way the wronged party can be made whole is to award him [prejudgment] interest from the time he should have received the money." *E.g.*, *Hembree v. Georgia Power Company*, 637 F.2d 423, 430 (5th Cir. 1981), *quoting Louisiana & Arkansas Railway v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966); *Payne v. Panama Canal Company*, 607 F.2d 155, 166 (5th Cir. 1979); *West v. Harris*, 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

The general rule in this Circuit, that the only way the wronged party can be made whole is to award him prejudgment interest from the time he should have

received the money on the date of the purchase or sale, is based on the principal that at the conclusion of the litigation the parties should be in the same position they occupied at the time of the transaction which lead to the litigation. *E.g.*, *Hembree*, *supra*, 637 F.2d at 430; *Payne*, *supra*, 607 F.2d at 166; *West*, *supra*, 573 F.2d at 882-883; *Louisiana & Arkansas Railway Co.*, *supra*, 359 F.2d at 317; *George R. Hall Company, Inc.*, *supra*, 532 F.Supp. at 997-998.

The federal standard applied in determining an award of prejudgment interest in §10(b) and Rule 10b-5 cases "is one of fairness" and a balancing of the equities. *Huddleston*, *supra*, 640 F.2d at 560 and cases cited in fn. 48 of the opinion; *Balan v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 457; *Sharp v. Coopers & Lybrand*, *supra*, 649 F.2d at 193; *West*, *supra*, 573 F.2d at 883; *Norte & Co.*, 416 F.2d at 1191; *Wessel*, *supra*, 437 F.2d at 284; *Wilsmann v. The Upjohn Co.*, 572 F.Supp. 242, 245 (W.D. Mich. 1983) (allowed an award of prejudgment interest in Federal Securities fraud case involving §10(b) and Rule 10b-5 case).

In considering the fairness to the plaintiff for an award of prejudgment interest, the courts focus on awarding the plaintiff an amount to compensate him for the value of the lost use of his money. *E.g.*, see cases previously cited for the proposition that the only way to make the plaintiff whole is to award him prejudgment interest from the time he should have received the money cited above; *Kris-Kraft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1, 97 S.Ct. 926 (1977) (an award of prejudgment interest should compensate the plaintiff for the lost use of his money); *Freschi v. Grand Coal Venture*, *supra*, 588 F.Supp. at 1261 (award of prejudgment interest should compensate a plaintiff for

the lost use of his money); *Western Federal Corp. v. Davis*, *supra*, 553 F.Supp. at 821 *aff'd* (award of prejudgment interest at the commercial money market rate in an effort to compensate the plaintiffs for the loss of the use of their money); *George R. Hall, Inc., supra*, 532 F.Supp. at 997 (the court held it was impossible to say that a plaintiff had been made whole if it was merely paid back the costs of its 1979 repairs in inflated 1982 dollars without any prejudgment interest); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1228 (D.C. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974) (rate of prejudgment interest awarded should "compensate fairly the defrauded purchaser for the loss of the use of his money", 297 F.Supp. at 1229); *see Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966).

Other factors and standards which federal courts use in determining whether or not to grant prejudgment interest in a §10(b) and Rule 10b-5 case include the degree of personal wrongdoing on the part of the Defendants, whether the prejudgment interest would be compensatory in nature, whether Plaintiffs passed up other, reasonably available and attractive opportunities, whether the Plaintiffs intentionally prolonged the time between the occurrence of the violation and the award of the Judgment or whether the Defendants were at least equally if not more responsible for the delay. *E.g.*, *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-1192 (2d Cir. 1969); *Wilsmann v. The Upjohn Company*, 572 F.Supp. 242, 245 (W.D. Mich. 1983); *Western Federal Corporation v. Davis*, 553 F.Supp. 818, 821 (D. Ariz. 1982), *aff'd*, 739 F.2d 1439 (9th Cir. 1984); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970); *see cases cited supra* holding that considerations of fairness must

be reviewed and that the only way to make a plaintiff whole is to award him prejudgment interest for the lost use of his money; *see Huddleston v. Hermon & MacLean*, 640 F.2d 534, 560 and cases cited in fn. 48 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, _____ U.S. _____, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

Turning to the facts in this case, an award of prejudgment interest clearly is fair under any analysis or considerations of fairness. The jury has found that the Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley violated Federal Securities laws and statutory and common law fraud against the Plaintiffs and, as a result of their actions and conduct, Plaintiffs sold their family business which was their primary if not their sole asset, on terms which they would not have accepted but for such conduct and actions on the part of these Defendants.

It is clear that if the Plaintiffs had been informed of what the jury has found to be the truth concerning the inaccuracy of the financial statements and financial condition of E. T. Barwick Industries, Inc., they would not have entered into the Merger Agreement. The jury awarded damages pursuant to the Court's instructions as of the date of the merger, September 8, 1969. The Plaintiffs have lost the use of that money since September 1969. Thus, the degree of personal wrongdoing on the part of these Defendants has been established, and fundamental considerations of fairness dictate an award of prejudgment interest be provided to the Plaintiffs.

The uncontradicted testimony at trial established that there was available substantial and reasonable alternative investment opportunities to the Plaintiffs prior to their entering the merger with E. T. Barwick

Industries, Inc. [Trial Testimony of: Eric Blum, Kenneth Chasser, Myles Osterneck, and Guy Osterneck]. Therefore, there can be no doubt that the Plaintiffs passed up other, reasonably available and attractive opportunities to enter into this Merger Agreement and purchase stock of E. T. Barwick Industries, Inc. in exchange for the stock and assets of their family business, Cavalier Bag Company.

The Merger Agreement occurred on September 8, 1969. This case, instituted on September 4, 1975, did not come to trial for over nine (9) years. The trial in this case began on October 15, 1984. The delays involved in this complicated case, complicated both in terms of fact and law, cannot be laid on the doorstep of the Plaintiffs. In fact, the record in this case clearly demonstrates that the fault for the delay in bringing this case to trial lies squarely on the Defendants. Even a cursory review of the voluminous docket sheet filed in this case demonstrates this fact. The Defendants filed numerous motions including several motions for reconsideration attempting to end this case before going to trial.

For example, the Defendants filed motions to dismiss or for judgment on the pleadings. After the Court in May 1978 denied the motions of the Defendants for judgment on the pleadings or to dismiss, the Defendants filed in June of 1978 a Motion for Reconsideration of the Judge's May, 1978 Order and again sought dismissal or judgment on the pleadings. Subsequent to the Court's Order in September 1978 denying Defendants' Motion for Reconsideration, the Defendants filed a motion for a separate trial on the statute of limitations issue in October, 1978. After the Court entered its Order denying the request for a separate trial, the Defendants filed in 1980 motions to dismiss or in the alternative for summary judgment.

Subsequent to the Court's Order in December 1981 denying the Defendants' motions for summary judgment, the Defendants filed in August of 1982 another Motion to Dismiss or in the Alternative for a Stay of the Proceedings. The Court in April of 1983 entered an Order denying Defendants' Motion to Dismiss or in the Alternative for An Order to Stay of the Proceedings. After this Order the Defendants in October of 1983 filed a Motion for Reconsideration of the Court's Order denying them a separate trial on the issue of the statute of limitations. Defendants also filed in October 1983 another Motion for Reconsideration (the second Motion for Reconsideration) to reconsider the Court's Order denying summary judgment on the statute of limitations issue. This Court in February of 1984 entered its Order denying the Defendants' second Motion for Reconsideration of the statute of limitations issue and summary judgment, and entered its Order denying Defendant's Motion for Reconsideration of a separate trial on the statute of limitations issue.

Plaintiffs will not go through in detail the prior history of this case, which the Plaintiffs are confident the Court is well aware. There can be no doubt after reviewing the record of this case that the delay in bringing this case to trial is not the fault of the Plaintiffs, and clearly lies at the doorstep of the Defendants.

Another consideration which the courts apply in weighing the issue of prejudgment interest is to take judicial notice of the decline in the purchasing value of the dollar since the acts complained of occurred as a result of inflation. Federal Rule of Evidence 201. There, of course, can be no argument as to the decline of the purchasing value of the dollar since September of 1969 as the result of inflation, and this Court may and should take judicial notice of this fact when it determines the appropriateness of an award of prejudgment interest

and the amount of prejudgment interest. It must be remembered that the \$2.6 Million award to the Plaintiffs is for damages as of the date of the merger in September 1969.

It also is clear that the Plaintiffs were deprived of the principal sum they have been awarded as damages for fifteen (15) years, and thus prejudgment interest would in fact be compensatory.

In determining whether to award prejudgment interest to the Plaintiffs, the following fact should be considered:

The jury's verdict necessarily included a finding that the defendants committed a fraud upon the plaintiff. As a result of this fraud, the plaintiff was deprived of the use of his money, and the defendants and the benefit of their fraud, for many years. *See, e.g., Holmes v. Bateson*, 583 F.2d 542, 564 (1st Cir. 1978). The plaintiff, therefore, *can only be made whole if prejudgment interest is awarded to him.*

Wilsman v. Upjohn Company, *supra*, 572 F.Supp. at 245 (emphasis added and in original).

In *Norte & Company*, *supra*, 416 F.2d 1189, 1191 (2d Cir.) the court stated as follows:

However, as the corporation had been deprived of almost \$3,000,000, the difference between the fair value of the stock issued and what it actually received, through the calculated fraud of the defendants, there was good reason for the district court to award interest as compensatory damages.

Norte & Company v. Huffines, *supra*, 416 F.2d at 1191.

In *Cant v. A. G. Becker & Co., Inc.*, 384 F.Supp. 814 (N.D. Ill. 1974), the court in a Federal Securities fraud case stated it this way:

"However, in light of a recent decision by the Court of Appeals of the Seventh Circuit and other decisions by federal courts in securities cases, it is now clear that prejudgment interest may be awarded in situations wherein through the fault of another the plaintiff was deprived of beneficial use of its funds." (Citations omitted).

As Judge Cummings stated in *Mattigan (Mattigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974): "Had plaintiffs not purchased the Fidelity stock, or purchased at a lower price, they would have put the unused money somewhere, even if only in a savings account. Unlike the non-existence profits and division as a result of defendants' misrepresentations, the chance to use their money elsewhere was actually lost to plaintiffs. . . ."

Cant, *supra*, 384 F.Supp. at 815-816 (emphasis added) quoting in part *Mattigan, Inc.*, *supra*, 498 F.2d at 240. The court in *Cant* like the other Federal Securities cases, awarded prejudgment interest to the plaintiffs assessed from the date of the purchase and thereafter on the aggregate loss incurred to the date of judgment. 384 F.Supp. at 816; *see cases cited supra*. The court pointed out:

The defendant was found to be the "wrongdoer" in a series of stock transactions which were the subject of the litigation. A. G. Becker & Company, Inc. had the use of the plaintiff's funds for an extended period of time.

384 F.Supp. at 816.

As well stated by the court in *Cant*:

In lieu of rescission the Court still feels that plaintiff is entitled to an award of monetary damages sufficient to place him in the position he would

have been had it not been for defendant's wrongful activity. Allowing damages, interest, and costs restores plaintiff to that position. Plaintiff can only be made whole if placed in a posture which assumes that he had the opportunity to utilize his funds in a reasonable manner. The law does not permit defendants to obtain the beneficial use of plaintiff's funds at no cost to the wrongdoer.

Cant, supra, 484 F.Supp. at 816 (emphasis added).

III. THE APPROPRIATE AWARD OF PREJUDGMENT INTEREST TO THE PLAINTIFFS

In determining the appropriate award of prejudgment interest to the Plaintiffs, the federal courts have recognized that they may award interest applying commercial market rates in order to compensate the Plaintiffs for the loss of the use of their money. In *Western Federal Corporation v. Davis, supra*, the court in a Federal Securities claim case stated the following:

In light of the fact that the defendants violated the securities laws and that the plaintiffs have been deprived of the full use of the amounts paid, plaintiffs are entitled to recover prejudgment interest.

553 F.Supp. at 821. The court in *Western Federal* concluded that the appropriate rate of prejudgment interest to award the plaintiffs was based on the average rate that a consumer could have obtained in the money market during the two-year period in question. 553 F.Supp. at 821.

The court stated the following:

This Court recognizes that it may award in-

terest at the money market rate in an effort to compensate the plaintiffs for the loss of the use of their money. See Johns Hopkins University v. Hutton, 297 F.Supp. 1165, 1228 (citation omitted).

553 F.Supp. at 821 (emphasis added). The court pointed out that since the Federal Securities Act did not prescribe a legal rate of interest, "it has been ruled that the rate of interest imposed should 'compensate fairly the defrauded purchaser for the loss of the use of his money.'" *Western Federal Corporation, supra*, 553 F.Supp. at 821 (emphasis added), quoting *Johns Hopkins University v. Hutton*, 297 F.Supp. at 1229; see *Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966).

In *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974), the court approved an award of prejudgment interest in a Federal Securities claim case and recognized the commercial money market as appropriate to consider in determining the rate of prejudgment interest. In *Johns Hopkins* the Court rejected an automatic application of the legal rate of interest used by the state statute. After noting that prejudgment interest is used to compensate fairly the defrauded purchaser "for the loss of the use of his money", the court stated the following:

The comparative states of the money market at the times of purchase and of rescission are important factors in determining a compensatory rate of interest. [Citations omitted].

The court in *Johns Hopkins* took judicial notice of the data submitted concerning the prime interest rates during the period from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. *The*

court reviewed and analyzed the prime rate as demonstrating the reasonable level of return for a similar type of investment as made by the plaintiffs in that particular case. In *Johns Hopkins*, the court stated that the plaintiff was "an investor anticipating a return on its investment." 297 F.Supp. at 1229. In order to place the plaintiff in a position it would have been in were it not for the violations of the Federal Securities law of defendants "an examination is required to determine what *Hopkins* [plaintiff] could reasonably have expected to earn by a similar type of investment." 297 F.Supp. at 1229 (emphasis added).

This is an approach used by many cases as cited in the *Johns Hopkins* decision, the *Western Federal Corporation* case and other cases cited *supra*. The Court in *Johns Hopkins* concluded that the plaintiffs could have reasonably expected to earn a certain percentage per annum on its investment from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. The Court determined that since the purpose of awarding interest to the defrauded purchaser "is to compensate him for the amount which he could have safely earned by the use of his money," the choice of any date other than the date of which the fraudulent sale was made, "would amount to a decree of less than full compensation." 297 F.Supp. at 1233 and cases cited.

The Court in *Johns Hopkins* determined the appropriate rate of interest per annum based on what it believed plaintiffs could reasonably have expected as a return on the type of investment involved during that period of time, reviewing and analyzing the prime rate during the period of time, considering what the plaintiff could reasonably have expected to earn by a similar type of investment during that period of time, considering the contractual language involved in that case, and

determining an appropriate rate of interest as compensation for the loss of the use of the money the plaintiff should have received. 297 F.Supp. at 1227-1230, 1233, *aff'd*, 422 F.2d 1124 (9th Cir. 1970).

Thus, the federal courts clearly have recognized that the appropriate prejudgment interest imposed should "compensate fairly the defrauded purchaser for the loss of the use of his money," and that a court may award interest based on the commercial market rates and the prime rate in an effort to compensate the plaintiffs for the loss of the use of their money from the date of the acts complained of to the date of judgment.

Turning to the facts applicable in this case, Plaintiffs have concurrently filed herewith an Affidavit of Walter M. Singer with exhibits to provide the Court with interest rate calculations during the appropriate period of time from September 8, 1969 to the date of Judgment, January 30, 1985.

In determining the interest rate calculation for the period beginning September 8, 1969 to January 30, 1985, the principal amount used was \$2,632,234 which is the amount of the Judgment entered in favor of the Plaintiffs in the above-styled action. The date of the entry of the Judgment is January 30, 1985. The beginning date for determining the calculations, September 8, 1969 is the date of the merger agreement entered into between the Plaintiffs and Defendant E. T. Barwick Industries, Inc. and the date upon which the \$2,632,234.00 in compensatory damages was determined pursuant to the instructions of the Court.

The generally accepted and most appropriate method in determining interest rate calculations concerning the value of the use of money over a period of time for a similar type of investment as made by the Plaintiffs in this case is to apply the three-month Certificates of

Deposit interest rate calculations from September 8, 1969 to January 30, 1985 on a compounded interest basis. [Affidavit of Walter Singer at ¶¶6, 7 and 18]. This approach is the most appropriate in determining the proper rate of interest because the Plaintiffs, as testimony shows at the trial, intended as their goal a long-term growth investment and savings by their purchase of Barwick stock in exchange for the sale of Cavalier Bag Company. Based on this approach, the appropriate amount of interest from September 8, 1969 to January 30, 1985 is the sum of \$7,580,099.59, which is the calculation provided in ¶6 of the Affidavit of Walter M. Singer and attached thereto as Exhibit "B". This is the interest calculation using the three-month Certificates of Deposit interest rates from September 8, 1969 through January 30, 1985, on a compounded basis. The equivalent compounded annual interest rate over this period of time using this approach equals 8.9035%.

We have provided the Court for its convenience interest calculations using other approaches as shown in ¶¶8 through 16 of the Affidavit of Walter Singer and Exhibit "C" through "L" attached thereto. Plaintiffs strongly urge the Court to apply the interest calculation using the three-month Certificate of Deposit interest rates since that approach is the most appropriate and closely analogous approach to a similar type of investment as the Plaintiffs in this case. This approach would compensate the Plaintiffs for the loss of the use of their money and make whole the Plaintiffs for their loss. This approach based upon a review and analysis of the commercial money and capital market rates and the prime rate during the appropriate period of time is the rate of interest the Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time. This is the most appropriate

approach upon a consideration of fairness and all the other factors which have been discussed above and applied by the courts in determining the award of prejudgment interest to Plaintiffs in Federal Securities claim cases.

The average prime rate charged by banks over the period of time from September 1969 to January 30, 1985 is 10.15%. [See Affidavit of Walter M. Singer at ¶15 and Exhibits "J" and "K" attached thereto].

For the convenience of the Court Plaintiffs have provided the following chart of other interest calculations:

	Total Interest	Equivalent Annual Interest Rate
Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶7 and Exhibit "B" attached thereto]	\$7,580,099 .59	8 .9035%
Annual Average of Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶8 and Exhibit "C" attached thereto].	\$7,063,196 .91	8 .5589%
Three Month Cerificates of Deposit (simple interest) [Aff. of Singer at ¶9 and Exhibit "D" attached thereto]	\$3,614,171 .77	8 .919%
Annual Average Interest Rate—Three Month Cer- tificates of Deposit (simple interest) [Aff. of Singer at ¶10 and	\$3,597,382 .62	8 .8776%

App. 22

Exhibit "E" attached thereto].		
Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 11 and Exhibit "F" attached thereto].	\$7,169,596 .11	8.7242%
Annual Average Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 12 and Exhibit "G" attached thereto].	\$6,746,720 .34	8.4255%
Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 13 and Exhibit "H" attached thereto].	\$3,544,988 .90	8.7483%
Annual Average of Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 14 and Exhibit "I" attached thereto].	\$3,498,903 .90	8.6346%
Constant 7% (compounded annually) [Aff. of Singer at ¶ 16 and Exhibit "L" attached thereto].	\$4,830,744 .71	7.00%
Constant 7% (simple interest) [Aff. of Singer at ¶ 17 and Exhibit "M" attached thereto].	\$2,836,538 .63	7.00%

The interest calculations applying a 7% interest rate

App. 23

per annum from September 8, 1969 to January 30, 1985 compounded annually and utilizing a simple interest approach not compounded annually, are based on an application of O.C.G.A. §7-4-2. The constant 7% interest rate clearly is not appropriate in this case based on the circumstances and facts in evidence, based on all the facts the Court must consider in determining an award of prejudgment interest, and based on a review and analysis of the cases recognizing the intent of an award of prejudgment interest to make the Plaintiffs whole and to provide them for the lost use of their money from the date of the acts complained of. A review and analysis of the prime rate (10.15%) and the commercial market interest rates during the appropriate period of time, and consideration of what Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time, mandate that the interest calculation applying a constant 7% rate is far too small and would not compensate the Plaintiffs for the loss of the use of their money. This case is in a unique situation due to the comparative states of the commercial market rates from the time of the acts complained to the date of judgment.

App. 24

CONCLUSION

For all the above reasons and based on the record in this case, Plaintiffs respectfully request the Court to award them prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985.

Respectfully submitted,

/s/

PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/

HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel

WEBB & DANIEL
1901 Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-8841

App. 25

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Brief In Support of Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

Philip R. Russ, Esq. 1005 Texas American Bank Building P.O. Box 12073 Amarillo, Texas 79101	Foy R. Devine, Esq. Devine & Morris Four Piedmont Center, Suite 111 3565 Piedmont Road, N.E. Atlanta, Georgia 30305
---	---

Susan Hoy, Esq. High House 309 Sycamore Street Decatur, Georgia 30030	Richard M. Kirby, Esq. Hansell & Post 3300 First Atlanta Tower Atlanta, Georgia 30383
--	--

Earle B. May, Jr., Esq.
Alston & Bird
1200 C&S National Bank
Building
35 Broad Street
Atlanta, Georgia 30335

This 11 day of February, 1985.

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs